# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 21, 2009 |
| v | No. 282965<br>Ingham Circuit Court |
| DAVID CHRISTMAS LEWIS,<br><br>Defendant-Appellant. | LC No. 07-001171-FH |

Before: K. F. Kelly, P.J., and Cavanagh and Beckering, JJ.

BECKERING, J. (*dissenting*).

I respectfully dissent in this matter, and would remand the case to the Ingham Circuit Court for a hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), limited to defendant's claim that trial defense counsel was ineffective because he failed to request an instruction on the lesser included offense of entry without permission, MCL 750.115.[1] While the decision to proceed with an all-or-nothing defense is a legitimate strategy, whereby the jury must either acquit or convict defendant on the charged offense, it is not clear from the record whether defense counsel purposefully employed this strategy, or rather, was negligent.

Defendant was charged with and convicted of first-degree home invasion, MCL 750.110a(2), arising from an incident where he walked into Ashley and Jonathan Insanas' kitchen through an unlocked garage door, encountered the Insanas, and told them he was worried or confused because he was looking for someone. Jonathan ultimately approached defendant and ordered him out of the house. While defendant initially responded to Jonathan's approach by holding up an empty or nearly empty water bottle as if he might throw it, defendant quickly put the water bottle down and left the house. Defendant admitted that he had entered the Insanas' home without their permission while under the influence of drugs, but contended that he was homeless, had only recently moved to Lansing, and thought he was entering the home of a recent acquaintance named Crystal, with whom he had smoked crack cocaine and consumed alcohol.

[1] The Michigan Supreme Court recently took similar action in *People v Biskner*, 483 Mich 878; 759 NW2d 215 (2009).

An instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find all of the factual elements of the lesser included offense and a rational view of the evidence would support it. *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003). The parties in this case both agree that the lesser included offense of entry without permission would have been warranted if defense counsel had requested it. Review of the record reveals that the evidence clearly supported such an instruction. The trial transcript indicates that jury instructions were discussed in chambers prior to closing arguments, and that when back on the record, defense counsel did not request an instruction on any lesser included offenses.

In order to warrant a new trial on the ground of ineffective assistance of counsel, a defendant must establish that trial counsel's actions fell below objective standards of reasonableness and, but for trial counsel's unreasonable conduct, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). In this case, defendant was ultimately convicted of first-degree home invasion. During deliberations, however, the jury requested additional instructions on the elements of larceny and assault. This could indicate that the jury was struggling with the second element of the offense, which required a finding that defendant either committed or intended to commit a felony, larceny, or assault (when he picked up the empty or nearly empty water bottle). Following defendant's conviction, his appellate counsel filed a motion for a new trial or in the alternative a remand for a *Ginther* hearing with respect to trial counsel's failure to request a lesser included offense instruction. The trial court denied defendant's motion, concluding that trial counsel had chosen an all-or-nothing strategy. While defendant and his trial counsel may have known about the availability of the lesser included offense of entry without permission and purposefully selected a go-for-broke strategy, the record is insufficient for this judge to conclude that is the case.

While an all-or-nothing approach may have increased defendant's chances of an outright acquittal as the majority contends, failing to request an instruction on the lesser included offense of entry without permission exposed defendant to a felony conviction punishable up to 20 years in prison, as compared to a misdemeanor conviction. In *People v Silver*, 466 Mich 386, 393 n 7; 646 NW2d 150 (2002), quoting *Keeble v United States*, 412 US 205, 212-213; 93 S Ct 1993; 36 L Ed 2d 844 (1973), our Supreme Court pointed out the danger of concluding that any error on this issue was harmless:

> "[I]f the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction . . . precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." [Alteration by *Silver*.]

Because defendant has demonstrated that there are factual issues regarding his trial counsel's performance that require further inquiry, I would remand for a *Ginther* hearing.

/s/ Jane M. Beckering